

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1147

To be argued by
DENISE L. COTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1147

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN
YARMOSH, JOSEPH FALCO, JOHN IANNONE,
IRVING ALBAHARI, and DAVID STEINBERG,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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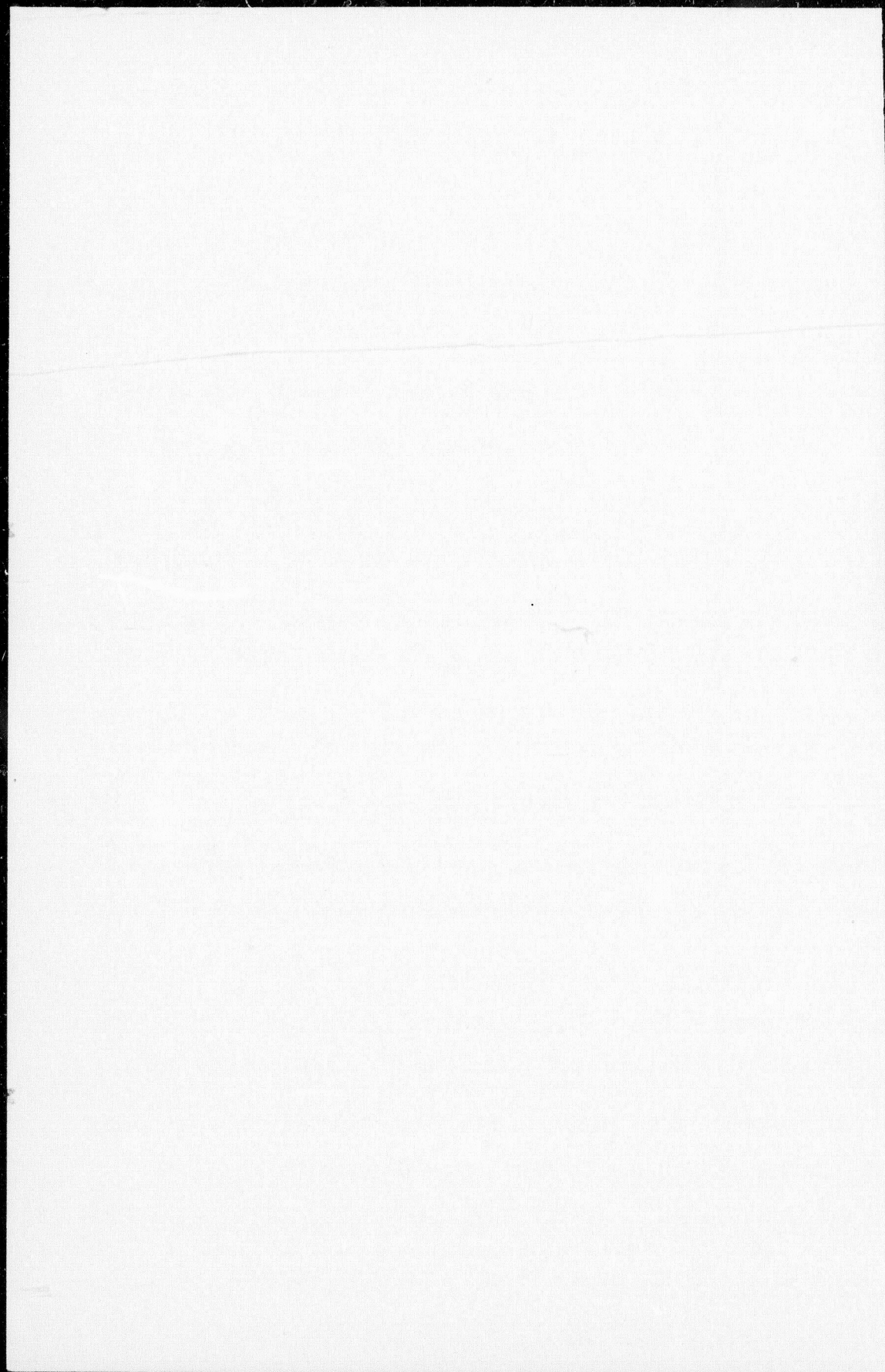
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and DAVID STEINBERG,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Falco, John Iannone, Irving Albahari and David Steinberg appeal from judgments of convictions entered on March 14, 1977, in the United States District Court for the Southern District of New York after a six-day trial before the Honorable Edward Weinfeld, and a jury. Nicholas Botta, Lawrence Messina, and John Yarmosh also appeal from a judgment of conviction entered on March 14, 1977, in the United States District Court for the Southern District of New York, following their plea of guilty before Judge Weinfeld.

Indictment S76 Cr. 1074, filed January 31, 1977, in two counts, charged Richard Esposito, Richard Rizzo, David Steinberg, John Iannone, Irving Albahari, Louis Maggio, Joseph Falco, Nicholas Renna, Lawrence Mes-

sina, Nicholas Botta, and John Yarmosh in Count One with conspiring to conduct an illegal syndicated gambling business in violation of Title 18, United States Code, Section 371. Count Two charged the same defendants with the substantive crime of conducting an illegal syndicated gambling business in violation of Title 18, United States Code, Section 1955.*

On December 29, 1976, Richard Rizzo pleaded guilty to Count Two of Indictment 76 Cr. 1074.

On January 17, 1977, Richard Esposito and Louis Maggio pleaded guilty to Count Two of Indictment 76 Cr. 1074.

On January 27, 1977, Nicholas Renna pleaded guilty to Count Two of Indictment 76 Cr. 1074.

On January 31, 1977, John Yarmosh pleaded guilty to Count One of Indictment S76 Cr. 1074.**

On February 7, 1977, Nicholas Botta and Lawrence Messina pleaded guilty to Count One of Indictment S76 Cr. 1074. Trial began against the remaining defendants on the same day. On February 11, 1977, the Government

* Indictment S76 Cr. 1074 superseded Indictment 76 Cr. 1074, which was filed on November 22, 1976. The superseding indictment was virtually identical to the initial indictment except that it did not allege that the appellant Irving Albahari was also known as "Brooklyn."

** All of the appellants who entered guilty pleas did so with the understanding that they preserved their right to appeal the denial of their pre-trial motions to suppress under the procedures approved by this Court. *United States v. Fury*, Dkt. Nos. 76-1506, 76-1512, slip op. 3195, 3196 (2d Cir. April 27, 1977); *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States v. Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); *United States v. Pond*, 523 F.2d 210, 212 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976); *United States v. Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

rested its case. The defendants offered no evidence on their own behalf. On February 14, 1977, the jury returned guilty verdicts on both counts as to all defendants (*i.e.*, Joseph Falco, Irving Albahari, John Iannone, and David Steinberg).

On March 14, 1977, Judge Weinfeld sentenced Richard Esposito to a term of one year and a day of imprisonment to run consecutively with a two and one-half year sentence that he was currently serving for interstate transportation of stolen securities; Richard Rizzo, Nicholas Botta, John Yarmosh, Lawrence Messina, John Iannone, and Nicholas Renna were sentenced to terms of one year and a day imprisonment; Joseph Falco was sentenced to a term of nine months imprisonment; David Steinberg was sentenced to a term of six months imprisonment; Irving Albahari was sentenced to a term of two years imprisonment execution of all but six months suspended; Louis Maggio was sentenced to three years probation.

All defendants except Richard Rizzo and Nicholas Renna are at liberty on bail pending this appeal.*

Statement of Facts

A. Pre-Trial Hearing

On December 20, 1976, an evidentiary hearing was held to resolve the appellants' pre-trial motion to suppress the results of electronic surveillance on the ground that they were not sealed immediately upon the expiration of

* As used in this Brief, "H. Tr." refers to hearing transcript; "Tr." to trial transcript; "S.Tr." refers to sentencing transcript; "HGX" to Government's Exhibits at hearing; "GX" to Government's Exhibits at trial, "Y.App." to Joint Appendix for Appellant Yarmosh; "I.&A. App." to Joint Appendix for Appellants Iannone and Albahari; and "B.&M. App." to Appendix for Appellants Botta and Messina.

the period that was authorized for interception pursuant to Title 18, United States Code, Section 2518(8)(a). Two witnesses testified at the hearing. They were William Bradbury, Jr., who was the Special Agent of the Federal Bureau of Investigation in charge of executing the Orders which authorized the electronic interception of the appellants' wire communications, and Michael D. Abzug, who was the Special Attorney in charge of ensuring that the execution of these Orders met with the statutory requirements set forth in Title 18, United States Code, Section 2510, *et seq.* Their testimony established the following facts.

On June 11, 1975, District Judge Edmund L. Palmieri signed an Order authorizing electronic interception of wire communications of Richard Esposito, Arthur Sonnenschein, Alex Nichas, Danny Kramer, Ritchie (LNU) and others who were then unknown over the telephone lines numbered (212) 860-0702 and (212) 860-0704, subscribed in the name of Jose Ramon Perez, 2433 Second Avenue, New York. Judge Palmieri's Order authorized interception for a period of twenty days or until the Government had attained the objective of its application for the Order.* Pursuant to the Order, interception began on June 11, 1975. (H. Tr. 5-6; H. GX 1).

*The Court described the objective of its Order as revealing "the manner in which Richard Esposito, Arthur Sonnenschein (a/k/a "Sunshine"), Alex Nichas (a/k/a "Alex the Greek"), Danny Kramer, Ritchie (LNU), and others as yet unknown participate in the illegal gambling business, the identities and roles of their confederates and their associates in the illegal gambling business, and the places and locations used in furtherance of the gambling business, the amounts of monies wagered, the amounts of monies owed to or by bettors and other participants in the gambling business, the distribution of contraband monies and records obtained by and used in the illegal gambling business, the methods of recordkeeping and the meaning thereof, the methods of operation used by the participants in the gambling business and the full nature and scope of the conspiracy involved therein. . . ." (H. GX 1).

Between June 11th and 15th, a number of wire communications pertaining to the syndicated gambling operation under investigation were intercepted. (H. Tr. 7). On June 14, 1977, conversations were intercepted in which Richard Rizzo advised the bettors that on Monday (June 16th) the wireroom would be moving and that new telephone numbers would be used to contact their wagers. Rizzo gave the bettors a number to call to receive the telephone number of the new wireroom. Posing as a bettor, Special Agent Bradbury called this number and received the new number from Richard Esposito. Esposito did not indicate whether the move from the "old" wireroom would be permanent. (H. Tr. 8-9). An examination of the records of the New York Telephone Company revealed that the "new" wireroom would be located at 251 East 123rd Street, approximately a block and a half or a five minute walk from the "old" wireroom at 2433 Second Avenue. (H. Tr. 9). On June 16th, Richard Esposito was observed carrying a large plastic trash bag from the old to the new wireroom. (H. Tr. 10). On June 16th and 17th, no conversations were intercepted. On June 17th, Special Agent Bradbury telephoned Special Attorney Abzug and informed him of the foregoing facts. (H. Tr. 11, 87-88).

The absence of communications, together with other indications that the operation had ceased to use the target telephones at the "old" wireroom, caused the Government to conclude, on June 17th, that the operation had, at least temporarily, begun to use telephones located at 251 East 123rd Street, New York, New York.

Special Agent Bradbury testified that based on his experience in at least thirty-five other gambling investigations and on the basis of the events on June 14th through 17th, he could not determine whether the move from the old wireroom was permanent. (H. Tr. 10).

In this connection Special Agent Bradbury noted that the operation had changed wirerooms once before. Moreover, he testified that it is customary for an operation to leave an individual in the old wireroom to accept any telephone calls from bettors who were not told of the operation's new telephone numbers. (H. Tr. 12-13). Additionally, an old wireroom is often utilized by the operation's principal, such as Esposito, to make calls of great evidentiary significance. For example, Esposito may have utilized the target telephones in the old wireroom after the move for the purpose of transmitting unwanted wagers to other gambling operations or to discuss the operation of his gambling business with a higher echelon figure. (H. Tr. 13).^{*} Finally, Special Agent Bradbury stated that "there was really no way of telling if the whole operation wouldn't have just picked up and moved back to (the old wireroom) in case they encountered any difficulty at the new location". (H. Tr. 13).^{**}

Since there was no conclusive evidence that the operation had permanently stopped using the target telephone numbers at the old wireroom, Special Agent Bradbury and Special Attorney Abzug decided on June 17th not to terminate the Government's capability of initiating electronic surveillance at the old wireroom. (H. Tr. 11; 87-88). They agreed that agents of the Federal Bureau of Investigation should keep both the old and new wirerooms under observation and that Special Agent Bradbury should remain in radio contact

^{*} This practice of transmitting unwanted wagers to other gambling operations is commonly known as "laying off" action. (Tr. 409-10).

^{**} As examples, Special Agent Bradbury noted that if the conspirators suspected that their new telephones were being tapped or if they experienced technical difficulties in the operation of their new telephones, they could have easily moved back to the old wireroom. (H. Tr. 13).

with the surveillance units in order to be ready to immediately begin monitoring the target telephones in the event that he was notified that one of the conspirators had entered the old wireroom. (H. Tr. 11-12).

From June 17th until June 23rd, 2433 Second Avenue and 251 East 123rd Street were kept under surveillance by Special Agents of the Federal Bureau of Investigation. The surveillance had two purposes: first, to ensure that the operation's move from the target telephones at 2433 Second Avenue to 251 East 123rd Street was permanent and that electronic surveillance pursuant to Judge Palmieri's Order would not have to be re-instituted, and, second, to gather probable cause for a new application for electronic surveillance should the move, in fact, prove permanent. (H. Tr. 11). During this eight-day period, the Federal Bureau of Investigation noted that the "new" address was in steady use by the wireroom clerk Richard Rizzo who was formerly using the target phones at 2433 Second Avenue. (H. Tr. 14). Accordingly, on Monday, June 23rd, Special Agent Bradbury and Special Attorney Abzug concluded that the move was permanent and that the investigative objectives set forth in Judge Palmieri's June 11th Order could not be met by continued electronic surveillance at 2433 Second Avenue. (H. Tr. 15, 92-95). Consequently, on June 23rd, the Government attempted to file a "10th day" report and offer the twenty-one original tapes for sealing.* (H. Tr. 15). Unfortunately, Judge Palmieri's chambers advised Special Attorney Abzug that he was unavailable for the day. (H. Tr.

* The "10 day" report was the second periodic progress report required by Judge Palmieri in his June 11th Order. It advised him that electronic surveillance of the target telephones had been discontinued on June 17th and that subsequent physical surveillance from June 17th to June 23rd had shown their continued disuse. (GX 4).

15, 80-81). Since Section 2518(8)(a) provides that sealing should be by the "authorizing judge", the Government waited until Tuesday, June 24th, when Judge Palmieri was available to seal the tapes. (H. Tr. 15, 81; HGX 3).

On July 10, 1975, District Judge Robert L. Carter signed an Order authorizing electronic surveillance of wire communications of Danny Kramer, Ritchie (LNU), Richard Esposito, Arthur Sonnenschein and Kenny (LNU), and others as yet unknown over the telephone lines numbered (212) 289-2579 and (212) 289-2547 located at 251 East 123rd Street; Danny Kramer, Ritchie (LNU), Richard Esposito, Kenny (LNU) and others as yet unknown over the telephone numbers (212) 686-2138 and (212) 686-2299 located at 343 East 30th Street, New York, New York; and Richard Esposito, Ritchie (LNU), Kenny (LNU), and others as yet unknown over the telephone lines numbered (212) 348-9822 and (212) 831-9709 located in two public telephone booths at the southwest corner of 81st Street and Lexington Avenue, New York, New York. (H. Tr. 16-17; HGX 2). Pursuant to the Order, interception began on July 11, 1975. (H. Tr. 88).

Between July 11th and July 29th, when interception was terminated, a number of wire communications pertaining to the syndicated gambling operation under investigation were intercepted producing one hundred and twenty tape recordings which had to be audibly duplicated before sealing. (H. Tr. 25; 83-84).

In order to comply with Section 2518(8)(a)'s provision for "immediate sealing", Special Agents of the Federal Bureau of Investigation attempted to duplicate the original tapes during the twenty-day period of Judge Carter's Order. It was necessary to duplicate these

tapes before sealing so that transcription of the intercepted conversations could be made from "working copies" rather than originals which might be inadvertently damaged or misplaced. (H. Tr. 25, 29). Accordingly, to facilitate prompt duplication, the monitoring agent would give at least four original tape recordings to the supervising case agent, Special Agent William Bradbury, when monitoring was completed for the day.* (H. Tr. 19, 23). To minimize the chance that the tapes would be misplaced or damaged, Bradbury, in addition to his other duties as the case agent in charge of the electronic surveillance, either duplicated the original tape recording himself or had Special Agent Jerry Ryan duplicate them under his supervision. (Tr. 47-18, 46). In this way the original tape recordings were always under his sole custody and supervision from the time they left the monitoring agent until they were ultimately sealed. (H. Tr. 19-20).

After the tapes were duplicated, Bradbury placed the originals in a locked cabinet and gave the duplicates to other Special Agents under his supervision to play through to make sure they were audible copies. Only when the original tape was duplicated and the duplication was checked for audibility were the originals ready for sealing. (H. Tr. 25).

Despite Special Agent Bradbury's best efforts to finish duplication of the tapes by the end of the period authorized for surveillance while, at the same time, ensuring the integrity of those tapes by personally maintaining them in his custody and supervising their dupli-

*In an effort to avoid interception of non-pertinent calls, monitoring was only initiated when the suspected co-conspirators were observed entering the target premises or between certain hours of the day. Accordingly, the end of the "monitoring day" usually ended at 8:00 p.m. (GX 2).

cation, fifteen to twenty of the one hundred and twenty original tapes had not been duplicated by July 29th, the end of the period authorized for electronic surveillance. (Tr. 29).^{*} Duplication of those remaining original tapes was completed on August 6, 1975 and the tapes were sealed immediately that same day.^{**} (H. Tr. 29-30; HGX 6).

Special Agent Bradbury testified that the eight-day delay in sealing the original tapes was attributable to a number of unavoidable events that caused a backlog of original tapes needing duplication to develop. First, the Government was not able to follow the duplication procedures used during the interception pursuant to Judge Palmieri's June 11th Order. Special Agent Bradbury explained that during the first Order he was able to use equipment that would simultaneously duplicate the original tape recordings as they were being made. However, when he asked to use this equipment to duplicate the tapes which would be made pursuant to Judge Carter's Order he was told that the increased number of telephones to be monitored, as well as other monitoring activity at that time, made it "impossible" to provide the equipment. (Tr. 18-19). Since this equipment was unavailable, Special Agent Bradbury was forced to share the one manually operated duplication machine that was used by the entire Manhattan Field Office.^{***} Special

^{*} When Special Agent Bradbury advised the supervising Special Attorney shortly before July 29th that duplication problems would prevent sealing at the expiration of the Order, he was instructed to finish the duplication "as soon as he possibly could do it". (H. Tr. 96, 99, 54).

^{**} Since the authorizing judge (Judge Carter) was on vacation and therefore would not be available to seal the tapes for several days, the tapes were sealed by District Judge Charles E. Stewart, Jr. (Tr. 83).

^{***} The nearest alternate machine was in Newark, New Jersey. (H. Tr. 46).

Agent Bradbury testified that it took him approximately twenty-five minutes to duplicate an original tape and another twenty minutes for the duplicate to be replayed to ensure its audibility. (Tr. 24, 26). Unfortunately, Special Agent Bradbury was not always able to duplicate all of the original tapes which he received every night within twenty-four hours of their making. In addition to serving the duplication needs of one thousand agents, the machine was often unavailable because it was being used to duplicate other tapes of "extreme importance". (H. Tr. 23-24). On two or three occasions, for at least a day and a half, the machine broke down. (H. Tr. 24-25). On July 13th and 14th, the pen register machine broke down.* This forced Special Agent Bradbury to spend at least three days playing the original tapes back through another pen register in the hopes that it would reveal the telephone numbers called. (H. Tr. 26-28). In addition to being delayed by the unavailability of the duplicating machine and technical failures of the pen register, Special Agent Bradbury testified that the duplicates that were made were not always audible. In ten to twelve instances, duplicates had to be discarded and new ones made from the original tapes before they were ready for sealing. (H. Tr. 26).

At the conclusion of the testimony, the Government placed into evidence a stipulation, agreed upon by all of the appellants, that the original tape recordings which were made pursuant to the Orders of Judge Palmieri and Judge Carter were not altered, or edited in any way

* A pen register is a device that reveals the telephone number being dialed by the target telephone. See Application of the *United States* In the Matter of an Order Authorizing the Use of a Pen Register, 538 F.2d 956, 957 (2d Cir.), *cert. granted*, — U.S. — (1976).

from the time of their making until the time that they were sealed. (Tr. 101-05).

Based upon the evidence offered at the hearing, Judge Weinfeld found that there was a satisfactory explanation for the delay in the filing and sealing provisions of 18 U.S.C. § 2518(8)(a) with respect to the order of Judge Palmieri dated June 11, 1975 and the order of Judge Carter dated July 10, 1975. Accordingly, the appellants' motion to suppress was denied. (Tr. 115).

B. Government's Case

Testimony from Robert Briendel and Daniel Kramer established that from October 1974, until November 1975, an unlawful gambling business, code named the "Dixon" Operation, accepted from \$300,000 to \$1,000,000 in sports wagers a week. (Tr. 123-24, 276-77). The wagers were transmitted by telephone to members of the operation, known as wireroom "clerks," who received and recorded them at various apartments located in Manhattan. (Tr. 125, 269-70).

Briendel testified that from October of 1974 until January of 1975, when he was arrested for bookmaking by local law enforcement officials, he and the defendant Richard Esposito, supervised the Dixon Operation and shared in the profits. (Tr. 58-59). After Briendel's arrest, Esposito had sole responsibility. The wireroom clerks for the Dixon Operation included, at various times during the eleven month period, unindicted co-conspirators Ronald Head and Daniel Kramer, and the defendants Richard Rizzo and David Steinberg. (Tr. 64-65; 124-25; 273; 343-45). From October of 1974 to November of 1975, the Dixon Operation employed seven to ten runners, two of whom were the defendants Irving Albahari, also known as "AC," and John Iannone, also known as

"Kodak." * (Tr. 62, 101-05, 122, 274). Briendel testified that he first employed Albahari as a runner in the latter part of 1974. (Tr. 102). Following Albahari's entry into the operation as a runner, Briendel met him once a week in Manhattan for five to ten weeks to either give him money that the operation owed the eight to ten bettors on his "sheet" or collect money which his sheet owed to the operation. (Tr. 103-05).** A few weeks after Albahari began work as a runner for Briendel and Esposito, he introduced John Iannone to Briendel on 55th Street in Manhattan. (Tr. 102). Briendel, Iannone, and Albahari agreed that Iannone's code name should be "Kodak" and that Briendel should settle Iannone's accounts every week with Albahari. (Tr. 105-07). Though through this arrangement Briendel never saw Iannone again, he spoke to him every night for two months over the telephone to give him his "figures" or the money owed to or by the bettors on his sheet. (Tr. 106-07). Briendel testified that this arrangement continued until late December 1974 when, at Albahari's request, Briendel arranged for Albahari to operate his own wireroom

* "Runners" are individuals who are responsible for inducing bettors to place wagers with the operation. Each bettor so induced becomes part of his runner's "sheet" and receives the wireroom's telephone number and a code name. When he wishes to place a wager, he calls the wireroom, identifies himself and his runner (e.g., Jay for Brooklyn), and makes his bets. The runner has the weekly responsibility of paying his sheet's winning wagers and collecting the bettors' losing wagers. In return for this service, the runner customarily receives between 25% and 50% of his sheet's winnings. (Tr. 60-62, 265). See also *United States v. Box*, 530 F.2d 1258, 1260-61 (5th Cr. 1976), for a general description of betting organizations.

** "Sheet" refers to the bettors who are the runner's responsibility to pay and collect from. (Tr. 265). Albahari had eight to ten bettors on his sheet. (Tr. 103).

rather than work for the Dixon Operation. (Tr. 135-36). Iannone's participation in the operation was corroborated by the introduction into evidence of four tape recorded telephone conversations between John Iannone and Richard Rizzo.* In these conversations, Rizzo gives Iannone his "figures" (how much his bettors won or lost for the day). (Tr. 120-22).**

The testimony of Briendel, Kramer, and Nicholas Gianturco, an expert employed by the Federal Bureau of Investigation, established that in order for an operation to be profitable, it must attempt to balance its books so that it accepts the same amount of wagers on each side of a sports contest.*** (Tr. 128-29, 277, 406-10). Thus, if an operation receives too much "action" (or wagers) on one side of a contest, it must "lay off" (or transfer) its excess action to another gambling operation (who will accept it only if it needs the wagers to balance *its* book) to avoid the possibility of financial ruin should the heavy betting favorite win.****

* Briendel and Special Agent Nicholas Gianturco made these voice identifications (Tr. 110, 433-35). See *United States v. Chiarizio*, 525 F.2d 289, 296 (2d Cr. 1975); *United States v. Arredo-Sarmiento*, 545 F.2d 785, 792 (2d Cr. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1330 (1977).

** GX 4A is a transcript of such a conversation which occurred on June 12, 1975 at approximately 5:32 p.m.; 4B occurred on June 14, 1975 at 2:04 p.m.; 4C occurred on July 11, 1975 at 5:35 p.m.; 4D occurred on July 15, 1975 at 5:21 p.m.

*** In exceptional circumstances, when the operation feels strongly about who will win a particular game, it will intentionally imbalance its books by laying off action on the "wrong" or weakly wagered side of a sports contest. This places the operation in the status of a mere bettor who can either win or lose a lot of money. (Tr. 410).

**** On baseball wagers, the operation attempts to encourage equal betting on both sides of the contest by setting the odds (or "line") so that a great amount of money must be advanced to obtain a wager of a stated denomination on the favorite vis-a-vis the underdog. Thus, if the line on the Los Angeles-

[Footnote continued on following page]

The evidence at trial conclusively demonstrated that the Dixon Operation regularly "laid off" wagers to three other syndicated gambling operations: the National Operation (run by the defendant Joseph Falco), the Commander 1 Operation (run by the defendant Nicholas Renna), and the Mr. White Operation (run by the defendants Nicholas Botta, Lawrence Messina and John Yarmosh).^{*} (Tr. 129-135, 277-78, 410-30). The Government proved that the Dixon Operation regularly "laid off" action to the defendant Joseph Falco's National Operation by introducing evidence of telephone calls which established that many of the *exact* wagers which were placed with Richard Rizzo, the Dixon Operation wire-room clerk, were laid off later in the day to either Joseph Falco or one of his unidentified associates at the National wireroom.^{**} (Tr. 412-417). Falco's participation in the

Houston game is 6-1/2/7-1/2, this means that to bet the favorite (Houston), the bettor must wager \$7.50 to win \$5.00, while to bet the underdog (Los Angeles), he must only wager \$5.00 to win \$6.50. The operation, if it accepts the same amount of action on Houston and Los Angeles, cannot lose. If the favorite wins, the operation takes the \$5.00 bet by the loser to pay the winner his \$5.00. If the underdog wins, the operation takes the \$7.50 bet by the loser, pays the winner \$6.50 and earns a profit of \$1.00. (Tr. 406-10).

^{*} The "lay off" from the Dixon Operation to the Mr. White Operation differed slightly from those to the National and Commander 1 Operations. The Dixon Operation transmitted excess wagers by telephone directly to wirerooms of the Commander 1 and National Operation at the end of the gambling day. However, lay offs to the Mr. White Operation were "moved" through the conduit of Daniel Kramer who from June to July of 1975 received the Dixon lay offs at his apartment and, in turn, transmitted to the Mr. White wireroom. (Tr. 283-309, 423-31).

^{**} Three telephone calls were intercepted on June 13, 1975 (GX 9A and 9B) and June 14, 1975 (GX 7A and 44). The Government also proved that the exact wagers placed with the Dixon Operations were laid off to the Commander 1 and Mr. White Operations by "tracing" the incoming bet to Rizzo out to Renna (Commander 1 clerk), and Botta or Messina (clerks for Mr. White). (Tr. 418-30).

National Operation was demonstrated by the introduction of three telephone calls between Richard Rizzo at the Dixon wireroom. In these calls, Falco, before taking Rizzo's lay offs, identifies himself as "National." * (Tr. 200-208). Two Special Agents of the Federal Bureau of Investigation identified Government's Exhibits 7A-C as telephone conversations between Falco and Rizzo.** Additionally, the Government introduced telephone conversations between an unidentified conspirator at the National wireroom and Rizzo at the Dixon Operation in which the Dixon Operation laid off to the National Operation and a meeting was arranged for 3:00 p.m., June 14, 1975, in front of Richard Esposito's candy store at 2419 Second Avenue, New York, New York.*** At 2:03 p.m., June 14, 1975, Falco entered the candy store at 2419 Second Avenue and left forty minutes later with Richard Esposito. (Tr. 198). Two hours later, Rizzo called Kramer and told him that Falco met Richard ("Dickie") Esposito to advise him that the National Operation could not take any more lay offs from the Dixon Operation:

Richard Rizzo (RR)

Daniel Kramer (DK)

RR: Hello.

* These telephone calls were intercepted on June 14, 1975 (GX 7A) and June 15, 1975 (GX 7B and 7C). (Tr. 205-08).

** Special Agent Richard A. Nalley made his identification on Falco's voice on the basis of three meetings with him which resulted in conversation lasting an hour. (Tr. 199-204). Special Agent A. Robert Walsh made his identification by comparison of a voice exemplar given by Falco to the voices on Government's Exhibit 7A-C. (Tr. 233; 242).

*** These conversations were intercepted on June 13, 1975. (Tr. 133-35; GX 6A and 6B). The regular contact between the Operations is shown by a remark made by the clerk in the National wireroom to Rizzo that "he" (Esposito) should meet them at the same place that they meet him the week before. (GX 6A, p. 3).

DK: Yeah. What's up?

RR: Just tryin' to get ya.

DK: Why?

RR: I was just talkin' to the guy, you that, ah, you know lay off the stuff to.

DK: Yeah.

RR: He's, he met with Dickie this afternoon.

DK: Yeah.

RR: He's givin it all back to him. He don't want it.

DK: Why?

RR: Cuz the guy don't want it. It's too much. He's losin his own customers. People can't get in. The guy can't handle it. I don't think it's cuz of money. He just can't handle all the work. He needs two offices, you know.

DK: What's Dickie gonna do?

RR: He doesn't, I don't know. Dickie doesn't know that I know. You know what I'm sayin. The guy says I just told him Monday he's goin back to him. But don't say nothin I told you the guy says to me, you know. He'll tell ya. Don't you say nothin neither.

DK: Big inside information.

RR: Huh?

DK: Big inside information.

RR: Uh, it's the guy that's handlin it. It's gotta be inside information. No?

DK: Sure. All right, let me see what I got here. What is . . .

RR: Hold on a minute.

(Tr. 228-29; GX 8A).

C. The Defense Case

None of the defendants offered any evidence.

ARGUMENT

POINT I

The Wiretaps Ordered By Judges Palmieri and Carter Were Proper.

A. Standing

Albahari has no standing to challenge the wiretaps authorized by either Judge Palmieri or Judge Carter and Yarmosh is without standing to challenge the wiretap ordered by Judge Palmieri since neither is an "aggrieved person." 18 U.S.C. § 2518(10) (a). An aggrieved person is

"a person who was a party to any intercepted wire . . . communication or a person against whom the interception was directed." 18 U.S.C. § 2510 (11).

Albahari was not identified as a party to any intercepted communication and Yarmosh was only intercepted on the wiretap conducted pursuant to an order of Judge Carter. Neither Albahari nor Yarmosh was named in the two wiretap orders. *United States v. Fury*, Dkt. Nos. 76-1506, 76-1512, slip op. 3195, 3199 (2d Cir. April 27, 1977). It follows that they cannot raise the issue on appeal.

B. Statement Regarding Other Investigative Procedures

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Act") requires that each application for a wiretap order include a full and complete statement indicating either whether other investigative techniques have been tried and failed or whether they could be expected to fail.*

The applications for orders from Judge Palmieri and Judge Carter each contained detailed descriptions of both the investigative procedures already employed and the limitations of such procedures in successfully concluding the investigation. An affidavit of Special Agent William Bradbury of the Federal Bureau of Investigation accompanied each application and described at length the fruits of the investigation as of the time of each application.

The affidavit accompanying the application to Judge Palmieri detailed the information provided by each of the three informants who were bettors with the Dixon operation and the corroborative evidence gathered by federal agents through surveillance and searches of telephone and motor vehicle records. The affidavit presented to Judge Carter provided more current information gathered from the three informants themselves, or the leads provided by the informants, and in addition, included transcripts of conversations overheard during the five days the first wiretap intercepted conversations.

* The statute reads in pertinent part as follows:

"(1) Each application for an order authorizing or approving the interception of a wire . . . communication . . . shall include . . . (c) a full complete statement as to whether or not other investigative procedures have been tried and failed or why they appear to be unlikely to succeed if tried or to be too dangerous. . . ." 18 U.S.C. § 2518.

In addition to exhaustively describing the fruits of the investigations, each affidavit explained why these and other procedures were inadequate to achieve the goals of the investigation. Paragraphs seventeen to twenty of the affidavit before Judge Palmieri bore the heading "Need for Interception." In these four paragraphs Agent Bradbury explained that bookmaking operations are conducted primarily on the phone with little or no personal contact between the bettor and the bookmaker, since it is the "runner" and not the bookmaker who "settles up" with the bettors. (B. & M. App. 36A-38A). Drawing on his own experience and that of other Agents, Agent Bradbury explained that searches and raids are often useless. Gamblers do not usually keep permanent records. If records are available, they are frequently destroyed just prior to a search; if they are seized, records are customarily insufficient to establish the elements of an offense because of the difficulty in interpreting them without knowledge of the nature of the particular gambling operation. And as is frequently the case in gambling investigations, Agent Bradbury noted that the Government would be unable to use the testimony of its three informants, since each was afraid to testify. Finally, Agent Bradbury described how the covert nature of operations frustrated surveillance. The affidavit before Judge Carter incorporated and expanded upon this detailed evaluation of alternative investigative procedures. In addition, Agent Bradbury explained why the first wiretap, which had been active for only five days, was insufficient to achieve the objectives of the investigation. (B. & M. App. 71A-72A, 110A-13A).

Botta and Messina argued on behalf of all appellants that Agent Bradbury's affidavits merely recite the statutory language and assert in conclusory language that other investigative procedures were not attempted. On

the contrary, each affidavit details the other investigative efforts and fully discusses the reasons why wire interception is necessary.

The appellants also argue that the Government did not make a sufficient showing that the conventional investigative tools would not have succeeded. They suggest that the Government could have used its three informants, taped the informants' phone calls and raided the weekly meeting of runners with Richard Esposito at Manny's Lounge. Agent Bradbury's affidavits explain the futility of each of these methods. The informants were unavailable to give evidence at trial due to fear of testifying. Tapes of the informant-bettors' phone calls to the wire-room would only have provided evidence of one phase of the gambling operation involving only a limited number of its participants. The affidavits also explained in detail why even a search that was successful in procuring physical evidence would be insufficient without other evidence explaining the inner workings of the operation. These issues were resolved in the Government's favor by Judge Weinfeld, and are clearly consistent with the law. *United States v. Esposito*, 423 F. Supp. 908 (S.D.N.Y. 1976); see *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976).

In any event, it is not incumbent upon the Government to prove that no other techniques would be fruitful. As this Court noted in *United States v. Fury*, Dkt. Nos. 76-1506, 76-1512, slip op. 3195, 3208 (2d Cir. April 27, 1977),

"the purpose of these 'other investigative techniques' requirements 'is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the dif-

ficulties involved in the use of conventional techniques.' . . . Moreover, the required showing is to 'be tested in a practical and commonsense fashion.' [S. Rep. No. 1097, 90th Cong. 2d Sess. (1968),] 1968 U.S. Code & Admin. News [2112], *supra*, at 2190." (Case citations omitted).

See also United States v. Hinton, 543 F.2d 1002, 1011 (2d Cir. 1976), — U.S. —, 97 S.Ct. 493, 796 (1977); *United States v. Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

Finally, the appellants argue that the sufficiency of the other investigative techniques should be judged against their ability to reveal the identity of the participants in the Dixon operation, and not their ability to uncover Dixon's co-conspirators in other gambling organizations. It is not, however, merely the identity of participants in any illegal activity that is the goal of law enforcement. An investigation must not only uncover the identity of the participants, but also the nature and methods of the enterprise and gather admissible evidence to enable the Government to prove what is uncovered. Furthermore, discovery of co-conspirators was an aim of the FBI investigation, and legitimately so. A wiretap was, as the appellants admit, the only successful way of discovering the identity of co-conspirators in other organizations. This Court has approved the use of a wiretap for the very purpose of investigating additional co-conspirators. *United States v. Hinton*, *supra*, 543 F.2d at 1011; *see also United States v. Steinberg*, *supra*, 525 F.2d at 1130.

C. Sealing

The appellants seek to suppress the tapes taken pursuant to Judge Palmieri's order, although they were sealed seven days before the expiration date for the wiretap, on the ground that there was a delay in sealing.

The appellants do not claim that the tapes were altered or that they were prejudiced in any way by the alleged delay in sealing.

This argument is meritless. As the Government demonstrated in the District Court, the tapes were sealed (with a delay of a single day which is not at issue on appeal) immediately after the decision was reached that the objective of the wiretap had been achieved. Alternatively, if there was a delay of a week in sealing the tapes, the delay was justified by the need to determine whether the wireroom would be reactivated.

Interceptions occurred pursuant to Judge Palmieri's order from the day the order was signed, June 11, 1975, to June 15, 1975. Conversations overheard on June 14, 1975 indicated that the wireroom would be moved by June 16, 1975, but the Special Attorney Michael Abzug, on the advice of experienced Agents, decided to continue surveillance for a week to determine if the old wireroom would be reopened or used for any transitional operations.

The Act requires that tapes be sealed "immediately upon the expiration of the period of the order. . . ." 18 U.S.C. § 2518(8)(a). The Act defines the expiration of the order as follows:

"No order . . . may authorize . . . interception . . . for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." 18 U.S.C. § 2518(5).

Judge Palmieri's order of June 11, 1975 defined the termination of the wiretap in the same terms as the Act, with the exception that he limited the wiretap to twenty days. He ordered the wiretap to

"terminate upon the attainment of the authorized objective or, in any event, at the end of twenty (20) days." (B. & M. App. 5A).

Appellants argue that the objectives of the tap had been achieved on June 15, 1975, when the last interception occurred. Such an argument benefits from the hindsight that the old wireroom was indeed defunct on June 16, 1975. As demonstrated, however, if there had been a return of operations to the old wireroom or any collateral use of the old wireroom for the gambling operations now centered at the new wireroom, then the objective of the wiretap authorization would not have been achieved on June 15, 1975. Given the circumstances, it was reasonable to continue surveillance for one week after interceptions ceased to decide if the wiretap should be terminated prematurely, particularly in light of the fact that the information sought to be revealed through the wiretaps had only begun to be gathered.* As soon as the decision that the objective had been achieved was made on June 23, there was an attempt to seal the tapes. Due to Judge Palmieri's unavailability and the Act's provision for sealing by the issuing judge, however, the tapes were not sealed until June 24. 18 U.S.C. § 2518 (8) (a).**

At any rate even if the continuation of the investigation for one week were deemed a delay in the sealing of the tapes, then the need to ascertain whether operations had ceased at the wireroom was a reasonable basis for the delay. This Court held in *United States v. Fury*, Dkt.

* It is noteworthy that Judge Palmieri's order provided that the interception would not terminate when the type of communication sought was first obtained, but rather that the interception would continue until the full scope of the conspiracy was revealed or until twenty days had elapsed. This specific authorization surely indicates that an investigation to determine whether the old wireroom had actually been abandoned permanently was not only appropriate, but thoroughly justified.

** The Appellants do not advert on appeal to the one day delay between June 23 and June 24.

Nos. 76-1506, 76-1512, slip op. 3195, 3216 (2d Cir. April 27, 1977), in reviewing a six-day delay motivated by a desire to have the "issuing justice" seal the tapes, that

"[W]hen there is a reasonable basis for the delay, the failure to file an inventory and to seal 'immediately' does not compel suppression."

See also *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972); *United States v. Capra*, 501 F.2d 267, 277 n.10 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975). Thus, wholly unlike the situation in *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976), upon which the appellants rely, this is simply not a case where the Government had no explanation for its "egregious" delay, and indeed that opinion remanded for a determination whether certain reasons for delay raised for the first time on appeal were "sufficient to excuse the delay." *Id.* at 508. See also *United States v. Fury*, supra, slip op. at 3211, 3216.*

D. Notice

Yarmosh contends that Judge Weinfeld abused his discretion in refusing to allow him to make an untimely motion to suppress the sole conversation of his intercepted pursuant to Judge Carter's order on the basis of

* The appellants appear to abandon any argument on appeal that the wiretap authorized by Judge Carter on July 10, 1975 should be suppressed due to a delay of eight days in sealing. The security precautions for guarding the tapes and the desire to duplicate them before sealing resulted in an eight day delay. Judge Weinfeld found after a hearing that there was a "satisfactory explanation" for the delay in sealing the tapes procured pursuant to Judge Carter's order, as well as for the tapes procured pursuant to Judge Palmieri's order. (H. 115).

the Supreme Court's decision in *United States v. Donovan*, — U.S. —, 97 S. Ct. 658 (1977). *Donovan*, Yarmosh claims, so significantly changed the law that he should have been allowed to make a new claim based upon it. This assertion ignores both the law existing prior to the *Donovan* decision and the facts of this case, which amply demonstrate the correctness of Judge Weinfeld's decision.

During pre-trial proceedings, Judge Weinfeld set December 21, 1977, as the final date for pre-trial motions by Yarmosh.* Yarmosh made no motion based upon a claimed violation of the 90-day notice requirement of 18 U.S.C. § 2518(8)(d). One month later, the Supreme Court decided the *Donovan* case. Yarmosh claimed, as he does now, that the *Donovan* decision changed the law in that if the Government deliberately failed to give the District Court sufficient information upon which to determine whether discretionary notice was appropriate, intercepted conversations should be suppressed. (Tr. 1/26/77 at 1-3). The Special Attorney in charge of the prosecution then explained that no information concerning Yarmosh had been given the District Court until after the 90-day period "for the simple reason that the Government was unaware at that time that Mr. Yarmosh had been intercepted on the wiretap." (*Id.* at 4).** After assuring himself that no possible violation of the law occurred (*Id.*, at 9), Judge

* The date for his motions had already been extended on one occasion due to Yarmosh's change of counsel (H. Tr. 3, 118-19).

** In addition, Mr. Abzug explained, in detail, that an Agent as early as August 6, 1976, speculated that Yarmosh's voice might appear on one tape, and in order to "err on the side of caution" the Government issued "the notice to Mr. Yarmosh that he had been intercepted." Yarmosh was not positively identified as the source of the voice on the tape until August 26, 1976. (*Id.* at 5).

Weinfeld ruled that Yarmosh's proposed motion was untimely.

This decision was unquestionably correct. In a multi-defendant case * involving potentially complicated pre-trial issues and the possibility of hearings,** the District Court not only has clear authority under Rule 12(c) and (f) of the Federal Rules of Criminal Procedure to set and enforce time limits for making motions, but the obligation to do so. Any other procedure would, particularly in a period of readjustment to the recently effective Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.* and the rules promulgated thereunder, create chaos. In addition, Yarmosh's contention that *Donovan* created a change in the law is simply incorrect. Prior to *Donovan*, the most recent Second Circuit decision on the issue was *United States v. Principie*, 531 F.2d 1132 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1173 (1977). That opinion specifically noted that two of the panel's members believed that the Court's prior decision in *United States v. Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974), upon which Yarmosh now relies as stating the pre-*Donovan* law (Brief at 4), had been "undercut" by the subsequent decision of the Supreme Court in *United States v. Giordano*, 416 U.S. 505 (1974). While the Court followed *Rizzo*, it did so solely because of the pendency of the issue in the Supreme Court in the *Donovan* case. 531 F.2d at 1141-42. In short, this Court virtually begged defendants to whom the notice requirement arguably applied to keep the issue alive against the possibility that the Court in *Donovan* would overrule *Rizzo*. Yarmosh simply ignored

* At the time of the proposed motion, eight defendants were facing trial. (*Id.* at 8).

** Yarmosh's attorney specifically noted that he wished to have a hearing on the issue he raised. (*Id.* at 3).

this admonition, and thus can hardly claim that *Donovan* was "new" law.*

Finally, of course, and as Judge Weinfeld concluded at the time of the motion, the Government did not send notice to Yarmosh for the simple and obvious reason that he was not identified until August 1976, at which time notice was promptly sent. Thus, Yarmosh's motion was not only untimely but unfounded as well.

* In addition, of course, *Donovan* did not create any law inconsistent with *Rizzo* or *Principie*. The footnote upon which Yarmosh now relies, 97 S. Ct. at 673 n. 26, simply says that the Court is "therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties." Thus, the Court simply noted what it did *not* decide, not what the law might be. In addition, the second paragraph of the same footnote—not cited by Yarmosh—notes "Moreover, respondents . . . were not prejudiced by their failure to receive postintercept notice. . . ." This language, and particularly the introduction "moreover," indicates that even if the Government deliberately withheld notice, the defendants would still have to show prejudice. Yarmosh does not even claim prejudice.

Finally, and quite contrary to Yarmosh's contention (Br. at 7-8), neither of this Court's post-*Donovan* decisions, *United States v. Variano*, 550 F.2d 1330 (2d Cir. 1977) and *United States v. Fury*, *supra*, lend any support to his contention.

POINT II

The Evidence Established One Conspiracy In Which All Defendants Were Sufficiently Implicated To Justify The Joint Trial.

A. Single Conspiracy

The evidence at trial established that the four gambling operations, Dixon, Mr. White, National, and Commander I, were tied together into one conspiracy by the Dixon practice of "laying off" bets, i.e., pooling bets to spread the risk, with the three other organizations. "A system of lay off betting constitutes the cement which can weld widely scattered operations into an effective gambling organization." *United States v. Thomas*, 508 F.2d 1200, 1205 (8th Cir.), *cert. denied sub nom Schullo v. United States*, 421 U.S. 947 (1975). The practice of "lay off" bets is consistently held to make the persons in different organizations which engage in that practice, members of a larger gambling conspiracy. *United States v. DiMuro*, 540 F.2d 503, 508 (1st Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 733 (1977); *United States v. Box*, 530 F.2d 1258, 1265-66 (5th Cir. 1976); *United States v. Schaefer*, 510 F.2d 1307, 1312 (8th Cir.), *cert. denied*, 421 U.S. 975, 978 (1975); *United States v. Thomas*, 508 F.2d 1200 (8th Cir.), *cert. denied sub nom Schullo v. United States*, 421 U.S. 947 (1975); *United States v. Bohn*, 508 F.2d 1145 (8th Cir.), *cert. denied*, 421 U.S. 947 (1975); *United States v. Guzek*, 527 F.2d 552 (8th Cir. 1975); *United States v. McHale*, 495 F.2d 15, 18 (7th Cir. 1974); *United States v. Brick*, 502 F.2d 219, 224-25 (8th Cir. 1974); *United States v. Sacco*, 491 F.2d 995, 1002-03 (9th Cir. 1974) (*en banc*); *United States v. Ceraso*, 467 F.2d 653, 656 (3rd Cir. 1972).

Appellant Falco argues that without evidence that National, which Falco supervised, knew of the lay off betting between Dixon and either Mr. White or Com-

mander I, that there cannot be a single conspiracy uniting all four organizations.* Those who engage in "laying off" bets need not know that their counterpart is also "laying off" bets with others in order to be part of the larger group. *United States v. DiMuro*, 540 F.2d 503, 508 n.5 (1st Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 733 (1977), *see also United States v. Arroyo*, 494 F.2d 1316, 1319 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States v. Papa*, 533 F.2d 815, 820 (2d Cir. 1976).** The "laying off" with another organization provides the "mutual dependence and assistance" necessary to make one gambling operation part of the conspiracy. *See United States v. Bertolotti*, 529 F.2d 149, 154 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1106 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1129 (1977). The First Circuit has addressed this very issue in upholding the conviction of members of various gambling operations made interdependent by "laying off" bets with each other. It held,

"Alleged violators of § 1955 need not know that the activity they are engaged in also involved numerous other participants. *United States v. Brick*, 502 F.2d 219, 224 (8th Cir. 1974). The fact that various of the appellants may have had separate relationships with Santarpio does not make their activity an independent business un-

* There was evidence at trial that both Mr. White and Commander I knew Dixon was also laying off bets with other organizations.

** It is, of course, the general rule that one need not be specifically aware of the identities of all of one's co-conspirators. *Rogers v. United States*, 340 U.S. 367, 375 (1951); *United States v. Robinson*, 543 F.2d 951, 960 (2d Cir. 1976); *United States v. Gentile*, 530 F.2d 461, 465 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976).

assimilable into one overall operation. The legislative history of § 1955 indicates that Congress was aware that 'bookmaking' does not operate as a unified, centrally coordinated and controlled business enterprise. *United States v. Schaefer*, *supra*, at 1311-12. Given that each appellant was involved in the network of gambling activity revolving around Santarpio, it was not improper for the trial judge to admit evidence from each of the component operations against all appellants whose operations were, in effect, interdependent. *Id*; cf. *United States v. Bobo*, 477 F.2d 974, 988 (4th Cir. 1973), *cert. denied sub nom Gray v. United States*, 421 U.S. 909 (1975).” *United States v. DiMuro*, 540 F.2d 503, 508 n.5 (1st Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 733 (1977).

B. Severance

Appellants Iannone and Albahari argue that the joinder of “so many” defendants in a single trial created a “spillover” prejudice which denied the appellants a fair trial. This argument is meritless.

This is neither a case where the Government has failed to prove the existence of the single conspiracy uniting all of the defendants, nor a case in which a minor participant in one conspiracy has been besmirched by damaging evidence relating to another. *See, e.g., United States v. Variano*, 550 F.2d 1330, 1334 (2d Cir. 1977); *United States v. Miley*, 513 F.2d 1191, 1209 (2d Cir.), *cert. denied sub nom Vavarigos v. United States*, 423 U.S. 842 (1975). It is certainly not a “mass-conspiracy trial” where the Government tried “vast numbers of loosely-connected defendants.” (I. & A. Br. 21). On the contrary, the Government proved the existence of a single conspiracy in which each of the relatively few defendants on trial was a major participant.

A motion for severance is addressed to the sound discretion of the trial judge, *Opper v. United States*, 348 U.S. 84, 95 (1954); *United States v. Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972), and the denial of a motion for severance may not be reversed absent a clear showing that there has been an abuse of that discretion. *United States v. Taylor*, Dkt. Nos. 76-1210, 76-1256, 76-1264-66, 76-1288, slip op. 2805, 2833 (2d Cir. April 13, 1977). Prior to trial Judge Weinfeld found that the indictment was not so complex, the number of defendants not so large, nor the likelihood of prejudice to "peripheral" defendants so great as to justify an exception to the well-established rule that the joinder of multiple defendants charged with a single conspiracy is proper. *United States v. Esposito*, 423 F. Supp. 908 (S.D.N.Y. 1976). In the content of this relatively short, uncomplicated case, this conclusion was surely not an advise of discretion.

POINT III

The Evidence Was Sufficient To Support The Verdict.

A. Falco

Falco argues that his participation in Dixon's bookmaking business was too negligible to support the verdict against him. The evidence established that Falco controlled the National bookmaking operation. Tapes introduced at trial proved that Falco and associates at National accepted a series of "lay off" bets from Dixon. The tone and substance of the phone conversations justify the inference that the "lay off" betting was an established pattern of business. Furthermore, the meeting between Falco and Esposito, the head of Dixon, in which Falco arranged to end the "lay off" betting between the

two organizations, was held at a prior meeting place. The jury could reasonably infer that National and Falco had provided Dixon a "regular and consistent market for lay off bets," as charged by Judge Weinfeld. (Tr. 575). The fact that Dixon did not lay off bets with National throughout Dixon's life is irrelevant. A conspirator need not associate himself with the conspiracy for the life of the conspiracy, but only for a substantial period during the conspiracy, to be guilty. *United States v. Guillette*, 547 F.2d 743, 751 (2d Cir. 1976), and cases there cited. In addition, of course, on appeal the evidence upon which the jury bases its verdict must be examined in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60 (1942).

Falco's reliance on those decisions in which convictions for violation of Section 1955 were reversed is misplaced. Todaro was neither a bookmaker nor a lay off bettor, but merely a line maker, that is, one who predicted the point spread in athletic contests. *United States v. Todaro*, 550 F.2d 1300, 1302 (2d Cir. 1977). Similarly, the witnesses against Box in *United States v. Box*, 530 F.2d 1258, 1262-64 (5th Cir. 1976), were unanimous in describing Box as a bettor and not a bookmaker, even though Box occasionally accepted "lay off" bets. Finally, the evidence in *United States v. Falcone*, 311 U.S. 205 (1940), did not prove that the defendants in question knew of the existence of an illegal conspiracy.

B. Albahari and Iannone

The brevity of the argument made by Albahari and Iannone that there was insufficient evidence to warrant submission to the jury reflects the poverty of their claim. They argue that there was no surveillance of either of them and that only twenty-eight words from Iannone

were intercepted. Albahari was a runner for Dixon for five to ten weeks in late 1974 until he set up his own wireroom. (Tr. 102, 135-36). As a result, it was not surprising that he was not observed during the surveillance in 1975, and not overheard at all on the wiretaps during the summer of 1975. Iannone only met a Dixon supervisor on one occasion, and thereafter acted as a runner for Dixon by using an intermediary to make pickups and deliveries. (Tr. 104-106). There are four tape recordings of Iannone's conversations with Rizzo, a Dixon wireroom clerk, in which Rizzo gives Iannone the amounts the Dixon bettors won or lost for the day. (GX 4A-D). Iannone's voice was identified by two different witnesses. (Tr. 110, 434).

The chief witness against Albahari and Iannone was Briendel, a supervisor of the Dixon operation during late 1974. Briendel testified to weeks of periodic meetings with Albahari and daily phone calls with Iannone. (Tr. 107). The appellants argue that Briendel was thoroughly discredited. As this Court has recently noted, it is for the jury to evaluate credibility. *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3808 (2d Cir. May 25, 1977); *United States v. Hawley*, Dkt. No. 76-1469, slip op. 3239, 3243 (2d Cir. April 27, 1977), and cases there cited. In addition, it has long been the law in the federal courts that a conviction may be based upon the testimony of one accomplice, even where (unlike here) that testimony is wholly uncorroborated. *United States v. Bernstein*, 533 F.2d 775, 791 (2d Cir. 1976), cert. denied, — U.S. —, 97 S. Ct. 523 (1977), and cases there cited. Judge Weinfeld had instructed the jury appropriately regarding Briendel that the testimony of an accomplice or of a person with a criminal record "should be viewed with caution and carefully scrutinized." (Tr. 602). See *United States v. Floyd*, Dkt. Nos. 76-1462, 76-1463, slip op. 3495, 3498 (2d Cir. May 16, 1977); *United States v. Swiderski*, 570 F.2d 854, 860

(2d Cir. 1976). The jury's verdict was thoroughly justified by both Briendel's testimony and the tapes submitted in evidence.

POINT IV

Judge Weinfeld's Sentence Of Yarmosh Was Fair In All Respects.

On March 14, 1977, Judge Weinfeld sentenced the eleven defendants indicted in 576 Cr. 1074 after listening to the presentations made by each defendant and his attorney. Yarmosh contends that his sentence was based on two kinds of false information: first, that arrests for bookmaking were treated as convictions for bookmaking, ignoring the fact that the convictions were for disorderly conduct, and second, that a conviction for bookmaking was considered although it had been reversed and vacated due to an illegal search. Yarmosh also suggests that he was prejudiced by being sentenced at the same time as his co-defendants.

Before addressing each of these arguments, two points must be made regarding Yarmosh's sentencing. The first is that the Yarmosh sentencing memorandum not only failed to mention Yarmosh's criminal history, but also made the representation that apart from the crime for which he was about to be sentenced, "John Yarmosh has been a law-abiding citizen." (Y. App. 23). In response to the court's inquiry into the accuracy of that representation, Yarmosh's attorney referred the court to the probation report where the "state offenses . . . were fairly well set forth. . . ." (Y. App. 24). Yarmosh's counsel had read the pre-sentence report days in advance of sentencing. (Y. App. 31). In addition, at no time during the sentencing did Judge Weinfeld prevent counsel from addressing the court to clarify any confusion that might exist. Indeed, even as Judge Wein-

feld summarized Yarmosh's criminal record, and allegedly made the two errors of which the appellant now complains, the court engaged counsel in dialogue to clarify an ambiguity. (Y. App. 39).

A. Convictions for Disorderly Conduct

Judge Weinfeld prefaced his summary of Yarmosh's criminal record by noting that Yarmosh had "... not five but six—convictions of bookmaking and related activity in bookmaking. . . ." (Y. App. 39). The Judge proceeded to describe the sentence imposed for each conviction and concluded that Yarmosh was a "chronic violator in this area of law." (Y. App. 39).

While the record is not unambiguous, there are numerous indications that Judge Weinfeld was conscious of the fact that although Yarmosh had many arrests for bookmaking, his convictions were for lesser offenses. First, earlier in the sentencing process, Judge Weinfeld had remarked on the value of an arrest record, quite apart from convictions, in indicating a pattern of behavior and probable cause to believe the illegal conduct had occurred. (Y. App. 25). See *United States v. Hendrix*, 505 F.2d 1233, 1235 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970). Second, the Judge had noted the state practice in permitting bookmakers to plead to lesser offenses. (S. Tr. 70). Third, during the summarization of Yarmosh's record, the Judge distinguished one charge from the rest as being an "advanced gambling and conspiracy charge" rather than suggesting that the conviction was for such a crime. Fourth, by speaking in general terms of "bookmaking and related activity" and specifying the sentences meted out for each conviction, the Judge effectively combined a general description of the crimes with a specific reference to the seriousness with which the state criminal justice system viewed the crimes. Even a disorderly conduct

conviction must have an underlying factual basis, and it was undenied that the factual basis for all of the convictions was "bookmaking and related activity." See *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972).

B. Single Conviction Reversed

In commenting on what he considered to be a generally satisfactory pre-sentence report, Yarmosh's counsel took exception to the listing of a "10-21-60 misdemeanor" as "dismissed". (Y. App. 26). According to his attorney, the report should have indicated "reversed" since the defendant had been convicted on the charge, but the conviction subsequently reversed. *Id.* Later, when Judge Weinfeld summarized Yarmosh's criminal record, he omitted any mention of the "10-21-60" misdemeanor. On appeal, Yarmosh now indicates that it was the conviction stemming from an arrest on April 17, 1961, which was reversed. Thus, while Judge Weinfeld disregarded the conviction which the attorney indicated had been reversed, he did list the April 17, 1961 conviction as one of six previous Yarmosh convictions.

In the context of Yarmosh's attorney's preparation for sentencing, as evidenced both by his submission of a sentencing memorandum and the reading of the pre-sentence report prior to the date of sentencing, *United States v. Robin*, 545 F.2d 775, 780 (1976), *rehearing en banc denied*, slip op. 2591 (2d Cir. March 30, 1977), and the fact that the conviction relied upon stemmed from only one of a fairly lengthy series of similar arrests, the error is harmless.*

* Since the reversal was due to an illegal search and seizure, *New York v. Yarmosh*, 11 N.Y. 2d 397, 230 N.Y.S. 2d 135 (1962), and there was no doubt as to the sufficiency of the evi-

[Footnote continued on following page]

In *Townsend v. Burke*, 334 U.S. 736 (1948), the Supreme Court reversed a conviction where three of seven charges relied upon in sentencing had either been dismissed or ended in judgments of acquittal. *Burke* is distinguishable not only in the dissimilarity in the proportion of erroneous information, but also in the Court's emphasis on the fact that the defendants had not been assisted by counsel at the sentencing. Similarly, the extent of misinformation was of such a magnitude in *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970), that there is also no comparison between that case and what happened to Yarmosh. In *Malcolm* the defendant's entire criminal record had become garbled and, because of the Judge's interruptions, the prosecutor was unable to inform the court of the defendant's cooperation. Quite the opposite occurred here.*

dence as a basis for the verdict, 230 N.Y.S. 2d at 186; the reasoning in *United States v. Tucker*, 404 U.S. 443 (1972), would not apply. *Tucker* involved a conviction reversed for infringement of a defendant's Sixth Amendment rights, an infringement which may affect the reliability of the fact finding process at trial. *Id.* at 447 n.5. Indeed, this Court has specifically held that evidence seized in violation of the Fourth Amendment may properly be considered at sentence. *United States v. Shipani*, 435 F.2d 26, 27-28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

*Yarmosh also makes the offhand suggestion that the sentencing of all the defendants at one time was ill-advised, since "a substantial danger exists, and existed here, that facts pertaining to the acts of wrongdoing or criminal records of only some defendants may also be erroneously applied to others." Brief at 17. This claim is incorrect in both its particular and its general implications. First, there is simply nothing in the record that suggests that Judge Weinfeld confused Yarmosh's situation with that of his co-defendants, and indeed, the colloquy between Court and counsel demonstrated the extent to which the Court had focused on Yarmosh individually. (Y. App. 36-37). Nor, indeed, does Yarmosh demonstrate how separate sentencing procedures would necessarily lead to more individualized attention. More

[Footnote continued on following page]

In short, Yarmosh's claims concerning his sentence are meritless.*

POINT V

The Charge Was Proper In All Respects.

A. Unanimity

Iannone and Albahari attack the verdicts on Counts I and II as defective since neither the charge nor the verdicts indicated which people joined together to violate the statutes. The conspiracy in Count I requires proof that two or more people agreed to conduct an illegal gambling operation. 18 U.S.C. § 371. (Tr. 570-573). Count II charged participation in an illegal gambling business

fundamentally, however, employing common sentencing procedures has important positive benefits that Yarmosh simply overlooks. As indicated, the defendants in question all jointly participated in a criminal enterprise. Sentencing them together not only allowed the trial judge the opportunity to view the crime as a whole, and to hear all the arguments of counsel, but permitted an effective statement to the defendants and to the public regarding the seriousness of the crime and the relative culpability of each participant in it. The general deterrent value of such a statement simply cannot be underestimated.

* If Yarmosh is remanded for resentencing, the assignment of the case to Judge Weinfeld should not be disturbed. As this Court observed in *United States v. Robin*, Dkt. No. 76-1033, slip op. 2591 (March 30, 1977) (*en banc*), the general rule is that the appellate court should refrain from giving directions regarding assignment on remand. *Id.* at 2592-93. The nature of the errors and the fact that they were due to counsel's failure to correctly advise the court, rather than to any bias or infirmity on the part of the court, suggest application of the general rule, as does application to this case of the various criteria enunciated in *Robin*.

which involved "five or more persons who conduct finance, manage, supervise, direct, or own all or part of such business." 18 U.S.C. § 1955(b) (i) (ii). (Tr. 587). Neither prior to nor subsequent to the instruction of the jury did any defendant request that the court charge that the jury must be unanimous in its conclusion as to which two or five persons joined together. This omission occurred despite the fact that counsel for defendant Iannone made three exceptions to the charge at its conclusion, one of which resulted in Judge Weinfeld readdressing the jury. (Tr. 606-09). As a result of their failure to request a charge or to object to the charge, assertion of error has been waived unless there was plain error. Rules 30 and 52 of the Federal Rules of Criminal Procedure; *United States v. DiStefano*, Dkt. Nos. 76-1581, 76-1582, slip op. 3539, 3556 (2d Cir. May 16, 1977); *United States v. Nathan*, 536 F.2d 988, 992 (2d Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 337 (1976); *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

Appellants rely primarily on *United States v. Natelli*, 527 F.2d 311, 324-25 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), for their contention that the charge constituted plain error. There is dicta in *Natelli* that a judge, upon request, should charge a jury with regard to unanimity on a specific element of the offense if it is possible that the verdict could be based on more than one fact pattern without the assurance that the alternative fact patterns will be supported by the evidence. The Court in *Natelli* noted, however, that the practice in this Circuit is to assume that the general instruction on unanimity is sufficient. Furthermore, the Court in *Natelli* did not find error in the trial court's refusal to give the defendants' requested charge on unanimity with regard to a particular element. The Court noted that there is only cause for concern if the evidence would not support a verdict on one of the alternative specifications given the

jury. In this case, since the court did not list multiple grounds on which they could base their verdict, there was no suggestion to the jury that they had any alternative but unanimity upon which to base their verdict.* Finally, the defendants' failure to request a charge on unanimity may have been due to the uncontroverted nature of the

* *Natelli* is not only factually inapposite to the facts of this case, but was addressed to an unusual situation that distinguished that case from numerous decisions of this Court that govern the present one. In *Natelli*, the Government chose to incorporate in a single, substantive count two separate specifications of how the defendants made false and misleading statements. Each of the statements was wholly independent of the other. Either of them would be sufficient to sustain the count, but one of them necessarily must have been found by the jury. Finally, there was no allegation of joint or vicarious liability. The Court's conclusion that since one of the two specifications was improperly submitted to the jury (and since the trial) court had refused a defense request to withdraw that specification) the verdict became "insolubly ambiguous" was wholly consistent with prior decisions of this Court reversing (or indicating error in) cases where a case is submitted to a jury on two theories, one of which is erroneous. See, e.g., *United States v. Brecht*, 540 F.2d 45, 50 n. 10 (2d Cir. 1976); *United States v. Jacobs*, 475 F.2d 270, 282 (2d Cir.), cert. denied sub nom. *Lavelle v. United States*, 414 U.S. 821 (1973). In contradistinction to these cases, this Court has routinely upheld convictions in conspiracy cases or cases involving joint or vicarious liability where there was sufficient evidence to support any one of the stated objectives of the conspiracy, even though there could have been a lack of unanimity among the jurors. *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States v. Bernstein*, 533 F.2d 775, 793 (2d Cir. 1976), cert. denied, — U.S. —, 97 S. Ct. 523 (1977). As the Court noted in *Papadakis*, "Where a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives." 510 F.2d at 297.

This case, which involved a charge of conspiracy and joint liability for a criminal enterprise, is clearly governed by the latter line of cases rather than by *Natelli* and its antecedents.

evidence at trial that more than five people were involved in an illegal gambling business, and by inference, that more than two were involved in a conspiracy. Indeed, during summation defense counsel did not dispute the existence of the gambling operation, only their clients' participation in it.

B. Purpose of Section 1955

In charging the jury, the court deliberately referred to the Congressional purpose in enacting Section 1955 in order to counter the suggestions made by defense counsel that the offense was "innocuous". (Y. App. 34). Judge Weinfeld charged as follows:

"This Act was passed by Congress in an effort to stamp out large-scale gambling operations which annually drained billions of dollars from the public, and was a major source of income to organized crime where activities tend to subvert the democratic process and to corrupt public officials." (Tr. 561).

Exception was taken at the end of the charge. (Tr. 607).

Judge Weinfeld explained his purpose in instructing the jury on the statutory purpose as follows:

". . . I was very deliberate in putting that in the charge, particularly because at least one lawyer sought to shrug this offense off as being an utterly innocuous offense. It is far from being an innocuous offense." (Y. App. 35).

A Judge's charge should be viewed in its entirety. The impact of the charge can only be measured in the context of an entire trial. Given defense counsel's minimization of the crime, Judge Weinfeld was entitled to

"spear a red herring." *United States v. Cheung Kin Ping*, Dkt. Nos. 76-1362, 76-1368, slip op. 2063, 2069 (2d Cir. Feb. 28, 1977).

POINT VI

The Other Claims Of Error Are Without Merit.

A. Arraignment

Albahari asserts that the judgment entered against him is void since he was never arraigned on the superseding indictment. The original indictment was filed on November 22, 1976. Albahari was arraigned on the indictment on December 2, 1976. Thereafter, on January 31, 1977 a superseding indictment almost identical to the original was filed. Judge Weinfeld ordered pleas of not guilty to be entered to the superseding indictment prior to trial.

The superseding indictment did not charge, as the original indictment had, that Albahari was also known as "Brooklyn." At the close of the Government's case, Albahari moved for a trial order of dismissal since the Government had failed to prove that Albahari was "Brooklyn", as alleged in the indictment. (Tr. 464). The court expressed surprise that defense counsel could assert he was unaware of the new indictment. Defense counsel did admit that he "knew that the Government had a superseding indictment." (Tr. 465). The court concluded that counsel was "fully aware that there was a superseding indictment." (Tr. 466).

Albahari claims prejudice from the lack of a second arraignment, and the concomitant lack of notice of the superseding indictment. He states that the entire thrust of the defense was on the identity of Brooklyn. (I. & A.

Br. 18-19). An examination of the record reveals that Albahari's cross-examination of witness Walsh elicited that Briendel had identified Albahari as Brooklyn, a fact Briendel denied on cross-examination. This impeachment through use of a prior inconsistent statement was useful regardless of whether the code name Brooklyn was used in the indictment. Since Briendel, a former supervisor of Dixon, testified that he had employed Albahari as a runner, a prior misstatement regarding Albahari's code name was important. Indeed, Albahari's summation, which took place after the colloquy with the court concerning the superseding indictment, dwelt on the damage to Briendel's credibility from his denial of his previous misidentification of Albahari. (Tr. 529-30).

In order to vacate a conviction for failure to be arraigned, even when the failure involves the original indictment, the defendant must demonstrate prejudice. *United States v. Rogers*, 469 F.2d 1317 (5th Cir. 1972); *United States v. Evans*, 423 F. Supp. 528, 533 (S.D.N.Y. 1976). Particularly in view of the specific finding of the trial judge that Albahari was aware of the second indictment, he has failed to make this showing.

B. Voice Identification

Falco, Albahari and Iannone argue that reversible error resulted from an identification of Falco's voice based on fifty phone conversations intercepted pursuant to an illegal wiretap. They make this contention despite the fact that the testimony regarding the phone conversations was stricken. (Tr. 199-204). Judge Weinfeld restricted the basis of the voice identification to the witness' three face to face conversations with Falco. (Tr. 204).

Since evidence to which Albahari and Iannone object concerned Falco alone they are not aggrieved parties and

may not assert error on appeal. Falco suggests two grounds for reversal. First, that the identification testimony, by suggesting a previous investigation, was inadmissible since it tended to prove the criminal character of Falco. Fed. R. Evid. 404. Second, that the evidence was tainted by the illegal wiretap. Falco also contends that the prejudice resulting from each of these errors was magnified by the fact that the reporter read a portion of the stricken testimony to the jury in response to a request for testimony during its deliberations, despite the fact that the Judge interrupted the reporter and stated that the testimony had been stricken. (Tr. 612-13).

In the context of this case, the Court's direction to the jury to disregard the testimony was clearly sufficient to preclude unfairness to the defendant. See *United States v. Rosenwasser*, 550 F.2d 806, 808 (2d Cir. 1977); *United States v. Papadakis*, 510 F.2d 287, 289 (2d Cir.), cert. denied, 421 U.S. 950 (1975); cf. *United States v. Arredo-Sarmiento*, 545 F.2d 785, 790 (2d Cir. 1976), cert. denied, — U.S. —, 97 S. Ct. 1330 (1977).

In addition, the tapes that were used to identify Falco's voice were the tapes suppressed in *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976), due to a delay in sealing. In *United States v. Fury*, Dkt. Nos. 76-1506, 76-1512, slip op. 3195, 3213 (2d Cir. April 27, 1977), this Court held that tapes suppressed for a delay in sealing could provide probable cause for a wiretap order. As in *Fury*, reference to intercepted conversations during a voice identification is a derivative use, rather than a testimonial use of the tainted interceptions. *Id.* at 3214. Admission of the testimony would have been harmless error in any event since the witness had sufficient other unassailable contacts with Falco to make the identification. See *Boyd v. Henderson*, Dkt. No. 76-2158, slip op. 3519, 3531 (2d Cir. May 16, 1977).

C. Prosecutorial Misconduct

With little elaboration other than to say that the prosecutor made what they characterized as "oblique" references to the defendants' failure to present exculpatory tapes, Iannone and Albahari challenge the Government's summation as prejudicial. While the matter is ambiguous, it appears that appellants are complaining of the question the Government posed to the jury during rebuttal summation in response to the summation argument on behalf of Falco. Falco's attorney challenged the identification of Falco's voice by pointing out that the government had not played the Falco voice exemplar. (Tr. 521). The Government responded by asking the jury, "Do you think if that voice exemplar was exculpatory in any way that [Falco's attorney] wouldn't produce it?" (Tr. 545).

Albahari and Iannone cannot assert on appeal as error an argument on summation totally unrelated to them. Furthermore, the Government's query was an appropriate response to Falco's summation. *United States v. Floyd*, Dkt. Nos. 76-1462, 76-1463, slip op. 3495, 3499 (2d Cir. May 16, 1977); *United States v. Arnedo-Sarmiento*, *supra*, 545 F.2d at 793, and cases thus cited.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK)

DENISE COTE, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of June, 1977 she served two copies of the within brief by placing the same in properly postpaid franked envelopes addressed:

Guggenheimer & Untermeyer
80 Pine Street
New York, New York 10005

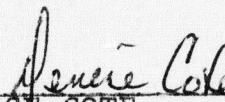
Daniel Crupain, Esq.
401 Broadway
New York, New York 10013

Marvyn M. Kornberg, Esq.
125-10 Queens Boulevard
Kew Gardens, New York 11413

Irving Anolik, Esq.
225 Broadway
New York, New York 10007

Jowl Winograd, Esq.
950 Third Avenue
New York, New York 10022

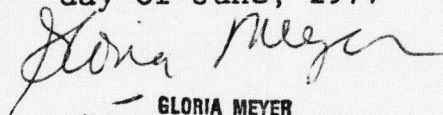
And deponent further says that she sealed the said envelopes and placed the same in the mailbox drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.



DENISE COTE

Sworn to before me this

21st day of June, 1977



GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979